

Senator Dick Durbin
Written Questions for Amy Coney Barrett, Joan Larsen, and Eric Dreiband
September 13, 2017

For questions with subparts, please answer each subpart separately.

Questions for Justice Joan Larsen

1. In 2006 you wrote an op-ed defending President Bush’s use of a signing statement on the Detainee Treatment Act, also known as the McCain Torture Amendment. The McCain Amendment prohibited torture and cruel, inhuman or degrading treatment. Waterboarding, or simulated drowning, is a torture technique that was used in the Spanish Inquisition. During the Bush Administration, the Judge Advocates General, the highest-ranking military lawyers in each of the U.S. military’s four branches, each testified unequivocally that waterboarding is illegal. Following World War II, the United States prosecuted Japanese military personnel as war criminals for waterboarding U.S. prisoners.

In a statement following passage of the McCain Amendment, Senators McCain, Warner, and Graham said “Waterboarding, under any circumstances, represents a clear violation of U.S. law. ... anyone who engages in this practice, on behalf of any U.S. government agency, puts himself at risk of criminal prosecution.”

a. Do you believe waterboarding is torture?

The 2006 op-ed to which the question refers did not take a position on President Bush’s signing statement regarding the Detainee Treatment Act, but rather discussed signing statements more generally. I have not had the occasion to consider the legal issues presented by the question posed, and it would be improper for me to opine on the outcome of an issue that could come before me in litigation without the opportunity to read parties’ briefs, hear oral argument, and conduct research.

b. Do you believe waterboarding is cruel, inhuman or degrading treatment?

As with Question 1a, I have not had the occasion to consider the legal issues posed by this question, and it would be improper for me to opine on the outcome of an issue that could come before me in litigation without the opportunity to read parties’ briefs, hear oral argument, and conduct research.

c. Is waterboarding illegal?

As with Questions 1a and 1b, I have not had the occasion to consider the legal issues posed by this question, and it would be improper for me to opine on the outcome of an issue that could come before me in litigation without the opportunity to read parties’ briefs, hear oral argument, and conduct research.

- d. President Bush issued a signing statement saying that he would interpret the Detainee Treatment Act “in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as Commander in Chief.” You wrote that this statement “presumably means that if circumstances arose in which the law would prevent him from protecting the nation, he would choose the nation over the statute.” You wrote that the “president’s independent vision of what the Constitution requires is critical.” **Do you believe it is appropriate to defer to President Donald Trump’s vision of when he believes the Constitution allows him to disregard a statute passed by Congress?**

Please see my response to Question 1 from Senator Feinstein.

2. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

That same group, the Judicial Crisis Network, ran \$140,000 in ads in Michigan after your nomination this year urging Michigan’s Senators to support you.

- a. **Justice Larsen, do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination?**

I did not solicit the assistance of the Judicial Crisis Network or any other outside organization as part of my nomination. I have no knowledge regarding donations that may have been made to the Judicial Crisis Network, disclosed or undisclosed. As a Justice of the Michigan Supreme Court, it is my duty to apply the law fairly and impartially to all litigants who appear before the Court. If confirmed as a circuit judge, I will do the same.

- b. **Will you condemn the making of undisclosed donations on behalf of your nomination?**

Please see my response to Question 2a. In addition, this question appears to call for me to weigh in on a political debate, which I cannot do, consistent with my ethical obligations. *See* Canon 5, Code of Conduct for United States Judges (“A Judge Should Refrain from Political Activity.”); Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

- c. **Will you ask the Judicial Crisis Network to stop running ads in support of your nomination unless the donations made to the Judicial Crisis Network are disclosed publicly?**

Please see my response to Question 2b.

- d. **Will you call for any donors to the Judicial Crisis Network to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

Please see my response to Question 2b.

3.

- a. **Can a president pardon himself?**

Article II, Section 2 of the Constitution gives the President the “Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.” I have not had the occasion to consider the legal issues presented by the question posed, however, and it would be improper for me to opine on the outcome of an issue that could come before me in litigation without the opportunity to read parties’ briefs, hear oral argument, and conduct research.

- b. **If the original public meaning of the Constitution does not provide a clear answer to this question, to what should a judge look to next?**

As in all cases implicating the Constitution, a judge should consider the text and structure of the Constitution, the arguments of parties, and any relevant precedent of the Supreme Court and the court on which she sits.

4. Question 17 of the Senate Judiciary Committee questionnaire asks each nominee to “[d]escribe the ten most significant litigated matters you personally handled, whether or not you were the attorney of record.” You responded to this question by describing eight litigated matters that you said “reflected [your] litigation experience from that time.”

- a. **Did you personally handle only eight litigated matters during your career as a practicing attorney?**

Most of my legal career has been devoted to teaching, government service, and my current service as a Justice of the Michigan Supreme Court. I began my career as a litigation associate at Sidley Austin, Washington, D.C., and the matters listed in response to Question 17 on my Senate Judiciary Committee questionnaire reflect my best efforts to recall my litigation experience from that time (1995 to 1997). I attempted, to the best of my ability, to provide accurate descriptions of all significant matters, based on my recollection, searches of Westlaw and online court records, and conversations with the attorneys with whom I worked. One matter, listed as the first item in the questionnaire, involved a case that was actively in trial for more than a year.

- b. **If you handled at least ten litigated matters, please provide a complete answer to Question 17. To the extent you may no longer have complete records of litigation matters you handled, please provide at least “a capsule summary of the substance of each case” and a description of “the nature of your participation in the litigation,” per the instructions in Question 17.**

Please see my response to Question 4a.

5. Why do you think you made the list of 21 Supreme Court candidates that the Federalist Society and Heritage Foundation helped President Trump compile?

I do not know why my name was placed on the list and cannot speak to the thought processes of those who compiled the list.

6. You state in your questionnaire that you have been a member of the Federalist Society intermittently from 1994-2003. Why did you join the Federalist Society?

I do not recall my specific reasons for joining the Federalist Society in 1994, but, in general, the Federalist Society sponsors discussion and debate on a wide variety of legal topics. Robust debate and the free exchange of ideas about legal topics are valuable to law students, academics, and legal practitioners.

7. The Federalist Society describes itself on its website as “a group of conservatives and libertarians interested in the current state of the legal order.” Do you agree with this characterization of the Federalist Society?

I cannot speak for the Federalist Society; I have no reason to disagree with the Federalist Society’s characterization of itself.

8. Do you believe it was appropriate for the President to announce the involvement of the Federalist Society in the selection of his candidates for the Supreme Court?

This question appears to call for me to weigh in on a political debate, which I cannot do, consistent with my ethical obligations. *See* Canon 5, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

9. Do you believe that the President’s announcement sent a message that lawyers and judges should not assert views that are at odds with the Federalist Society if they aspire to serve on the Supreme Court?

Please see my response to Question 8.

10. Are you concerned that the announced involvement of the Federalist Society and Heritage Foundation in selecting Supreme Court candidates undermines confidence in the independence and integrity of the federal judiciary?

Please see my response to Question 8.

11. Please list all years in which you attended the Federalist Society’s annual national convention.

In 2015 and 2016, I moderated a panel discussion at the Federalist Society's national convention. I attended the convention in one or two prior years, in the mid-1990s or early 2000s.

12. Do you agree, as a factual matter, with President Trump's claim that 3 to 5 million people voted illegally in the 2016 election?

I have had no occasion to review the data that would allow me to assess the accuracy of this claim. Moreover, the question might be construed as asking for me to weigh in on a political debate, which I cannot do, consistent with my ethical obligations. *See* Canon 5, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").